89-512

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

BARNEY J. TEARNEY **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, **Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lawrence B. Smith
3938 E. Grant Rd., #191
Tucson, Arizona 85712
(602) 326-0283
Counsel for Petitioner

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55 pp

QUESTIONS PRESENTED

1. Do *Chenery II* and *Bell Aerospace* provide a regulatory agency like the Federal Aviation Administration (FAA) with the unlimited choice of making or amending air-safety rules either by adjudication or by Administrative Procedure Act (APA) public notice and comment procedures, as the Fifth Circuit has held here, or is this judicially created exception to APA rulemaking requirements limited to the narrow situation where an agency is interpreting broad mandates in its charter and applying them to specific fact situations, as exemplified in District of Columbia Circuit decisions and other circuits?

2. In the face of the constitutional prohibition that Congress may not delegate to the executive branch its *Art. 1, § 1* legislative power to create benefits or penalties, and the APA § 9 mandate (which codifies it) that any such delegation must

be in plain language, is the term "public interest," without more, sufficiently definite to support a claim by the Federal Aviation Administration that it may suspend or revoke pilots' licenses as a penalty for safety violations?

3. Does the FAA's claim that it has authority to order suspension or revocation of a pilot's license as punishment for the violation of a safety rule, affording only administrative trial--rather than using the statutory civil-penalty-jury-trial system of justice--which claim is based upon a loose interpretation of the term "public interest," violate the letter and spirit of the APA because the agency has failed to promulgate this separate system of justice through APA public notice and comment procedures, even failed to publish its interpretation in the *Federal Register*?

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PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Barney J. Tearney respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding April 4, 1989, order denying Rehearing and Rehearing En Banc entered May 12, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 868 F.2d 1451, and reprinted in the appendix. (a-39)

The Opinion and Order of the National Transportation Safety Board (NTSB), not yet reported, is reprinted in the appendix (a-22), as is the administrative law judge's (ALJ) oral initial decision, which it affirmed. (a-5)

JURISDICTION

The Federal Aviation Administration initiated an enforcement action against petitioner under 49 U.S.C. app. § 1429(a) by first serving him with a Notice of Proposed

Certificate Action dated February 26, 1986, then by serving him with an Order of Suspension dated July 9, 1986 (a-1) which ordered a 7-day suspension of his Air Transport Pilot license as punishment for an alleged safety violation. Under § 1429(a), he appealed to the NTSB and hearing was held by the ALJ on January 30, 1987, who affirmed the suspension, with the final Board order, also affirming, entered June 17, 1988.

Capt. Tearney petitioned the Court of Appeals for the Fifth Circuit for review under 49 U.S.C. § 1486. That court entered a judgment and opinion affirming the NTSB order on April 4, 1989; an order denying a petition for rehearing and rehearing enbanc was entered May 12, 1989. Order A-8 extending time for filing a petition for a writ of certiorari, dated July 11, 1989, was signed by Associate Justice Byron R. White.

The jurisdiction of this Court to review

the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes and regulations directly relevant to the issues are here listed, with the pertinent portions of their text set forth in the appendix:

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 702-706 (1982): §§ 551(4), 552(a)(1), 553, 558, 706.

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982): §§ 1348, 1421, 1429(a), 1471(a)(1) & (2), 1473(a) & (b)(1), and § 1903(a)(9) (NTSB).

Federal Aviation Regulations, 14 C.F.R. Parts 1-199 (1989): §§ 13.19, 91.9, 121.-311, 121.542, 121.589.

Dept. of Commerce, Air Commerce Regulations, §§ 74 (1926). Civil Air Regulations, 14 C.F.R. §§ 20.371 & 20.37110 (1938).

STATEMENT OF THE CASE

Background -- During the period 1971 to

1983, Southwest Airlines (SWA), based in Dallas, Texas, carried 56,000,000 passengers. During that time, to effect more efficient utilization of its (now $25 million per copy) aircraft, its practice was to pushback from the gate with a tug, start engines and slowly pull away, although a few persons might still be standing for a few moments while locating carryon luggage in the overhead, putting a raincoat away, etc. (Exh. F, a-99)

Not only did Southwest never have an incident or injury to any passenger, there is no evidence that any such event has ever occurred on any other carrier, some of whom also engaged in the same practice. (Exh. F, a-99)

In January 1983 the FAA Principal Operating Inspector for SWA wrote to its president and told him that the agency considered the practice unsafe. He cited no Federal Aviation Regulation (FAR) as being

violated. (Exh. D, a-94) The company demurred. Then during late 1984 or early 1985 the FAA Southwest Region[1] initiated enforcement actions against several SWA pilots for taxiing with one or more passengers still standing. (Exh. I, a-105)

This was a ploy to pressure the company into changing its policy. It did. But only by posting an informal memorandum telling its pilots that the FAA was going to treat taxiing with passengers standing as a *per se* violation of its "careless or reckless" rule. (Exh. H, a-104) With that, Southwest regional counsel dropped all the pending violation actions. (Exh. I, a-105)

The Administrator, himself, also wrote to the company president, but neglected to cite any regulation as being violated. (Exh. E, a-96) In response to the presi-

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[1] FAA has nine U.S. regions: Alaskan, Central, Eastern, Great Lakes, New England, Northwest Mountain, Southern, Southwest, Western-Pacific.

dent's answer (Exh. F, a-99), the Administrator assured him that he was "taking all appropriate measures to standardize agency action." (Exh. G, a-102)

Over the next two years FAA officials received complaints in some ten additional cases from individuals who evidently believed there was some rule against it. This apparently convinced these officials that the company memorandum was not doing the job. So they again brought pressure--by now, May 1987--to formally change its flight operations manual. The company acquiesced and did so.

The pressure FAA officials used was this: They took case number ten, which they had not yet initiated as an enforcement action, by now four months after the alleged incident, and the second case against petitioner (*Tearney II*)[2], and on May 18,

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[2] It was later dropped for lack of evidence, after the complaining witness was deposed.

1987, issued an emergency order revoking his Air Transport Pilot (ATP) license.[3] (Exh. A, a-82)[4]

As compelling evidence that this was just a ploy, on May 21, just three days later, these same officials withdrew the emergency order (Exh. B, a-87) and proposed in its stead a 180-day suspension.[5] (Exh. C, a-90)

Issues -- The issues petitioner raises are strictly legal:[6] (1) The safety "rule"

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[3] It was well-known at SWA that the Director of the Southwest Region called the president and threatened that, unless SWA changed its flight operations manual, everytime the FAA got a taxiing complaint they would immediately issue an emergency revocation order against the captain. Aside from the impact on the individual, this of course causes any airline serious inconvenience.

[4] This order allowed him to exercise commercial privileges, which meant he could fly as first-officer for one year, a significant wage loss, and then would have to retake the ATP written exam and a flight test in a Boeing 737, at a cost of thousands of dollars.

[5] Since this order did not leave him commercial privileges so that he could fly right seat, it threatened Capt. Tearney with a wage-loss of $50,000.

[6] Capt. Tearney adamantly denied the charge. Of more than a dozen cases, to our best knowledge, only

(continued...)

he was charged with violating, as required by the Administrative Procedure Act (APA), has neither been published in the *Federal Register* nor, as a substantive policy, promulgated through public notice and comment procedures so that it may be found in the *Code of Federal Regulations*. These failures bar this action.

(2) The FAA claims that § 609 of the Federal Aviation Act of 1958, as amended (FA Act), authorizes it to suspend or revoke a certificate anytime its officials deem it to be in the "public interest." No language in that act so much as hints that suspensions or revocations may be used as a penalty. On its face, the agency's claim, means that it has created license penalties itself. Consequently, regardless of what Congress may have intended (there is ab-

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[6](...continued)
one captain admitted he'd knowingly started to taxi with a passenger still standing.

solutely no evidence it ever intended to grant such wide open power), this claim violates the constitutional prohibition that Congress may not delegate its legislative authority to create benefits or penalties. It also violates Section Nine of the APA, which codifies that principle and mandates that no penalty may be imposed by an agency unless specifically spelled out by its basic charter.

(3) Even assuming, *arguendo*, it to be valid, this claim of authority, constitutes a statement of general policy and/or an interpretation of § 609 of general applicability formulated and adopted by the agency. As required by the APA, the policy has neither been published in the *Federal Register*, nor promulgated through public notice and comment procedures as a substantive matter so that it may be found in the *Code of Federal Regulations*. These failures bar this action.

The great mystery is why FAA officials did not simply amend their air-carrier rule, one that directs that all persons on board should be in their seats with belt fastened during takeoff and landing, to include taxi. The answer, unquestionably, is that they wanted to avoid the hassle of APA rulemaking, and were sensitive to their lack of supporting evidence.

REASONS FOR GRANTING THE WRIT

Exceptional Importance

I. Making airsafety rules--rules of the road--by adjudicating that it is proper for the FAA to announce the new policy by letter to an individual airline assails the letter and spirit of the Administrative Procedure Act. In ratifying such a procedure, the Fifth Circuit has strained the rationale laid down in the landmark cases of *Chenery II* and *Bell Aerospace* beyond the breaking point: It has squarely held that the FAA in making airsafety rules has the

unfettered option of doing so either by adjudication, or by following APA public notice and comment procedures. Put another way, in any rulemaking situation, the agency may decline to follow APA procedures.

Petitioner does not question the holdings in *Chenery II* and *Bell*, but suggests that if they are so easily misunderstood, with such drastic consequences as depriving a citizen of his right to earn a living, and serious implications for airsafety in general, the time is ripe for the Court to redefine in plain language the exception to APA rulemaking they carve out and instruct that it should be very narrowly construed, indeed.

II. About one million citizens, pilots, mechanics, flight engineers, air-taxi operators, repair stations and air carriers hold certificates issued by the FAA. Perhaps 250,000 of them, or more, rely on their license for their livelihood, and

several hundreds of thousands owe their employment to an operator's right to do business.

Annually, at least two to three thousand airmen, mostly pilots, but a growing number of small operators, have their licenses suspended for periods of up to one year, or wiped out by revocation.

To have the FAA put people out of work, ruin careers, cause enormous hardship, by imposing suspensions and revocations as penalties, based solely on the claim that it may do whatever its officials deem to be in the public interest, is anomalous. The more so, when on its face this violates the fundamental constitutional principle that Congress may not delegate its legislative power to create benefits or penalties, which Congress itself saw fit to codify in plain language in the APA, so there'd be no mistake about it.

III. It is probably the greatest open

secret in government: No statute or rule so much as hints that the FAA may impose suspension or revocation of a license as punishment for the violation of a safety rule, and substitute a one-man administrative hearing for the statutory right to trial by jury. Nothing, not even a statement of policy published in the *Federal Register*.

I. FAA failure to publish or promulgate taxi-standing rule violates APA and requires dismissal.

The holding below is unequivocal. After acknowledging that the FAA only recently promulgated "through formal rulemaking a regulation concerning carry-on luggage . . .",[7] the Fifth Circuit said:

> That the FAA could have promulgated its taxiing rule through formal rulemaking does not mean that it should have done so. The FAA has broad discretion to proceed via formal rulemaking or on a case-by-case basis when it addresses safety concerns. As we held in *Miranda v. National Transportation Safety Boa-*

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[7] 14 C.F.R. § 121.589; *See* 52 Fed.Reg. 21476 (1987). This rule, *inter alia*, prohibits closing the boarding door until all carryon luggage has been properly stowed.

rd,[8] in choosing the latter method it committed no error.

Tearney v. NTSB, 868 F.2d 1451, 1453 (5th Cir. 1989) (emphasis added) ([redacted]).[9] It cites *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (*Chenery II*), saying it "unequivocally stated that an"

> agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

868 F.2d at 1453 (emphasis added) ([redacted]). It cites *NLRB v. Bell Aerospace Co.*, 416

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[8] 866 F.2d 805 (5th Cir. 1989).

[9] Many cases use "informal" which, as we understand it, means that notice and comment procedures were followed but that no public evidentiary hearing was held during rulemaking. This is somewhat confusing, as even without a hearing--which are almost nonexistent at the FAA--formal public notice and comment procedures must be followed. *See* 5 U.S.C. § 553.

It would seem better practice to use "informal" to describe "rules" that have not been put through any rulemaking procedures, and "formal" for those that have.

U.S. 267, 294 (1974), as reaffirming *Chenery II* and restating the principle that an agency "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." 868 F.2d at 1453 ([redacted]).

We should note that neither the FAA nor the Fifth Circuit disputes the obvious, that the taxi-standing policy constitutes a "statement of general policy" or "interpretation of general applicability formulated and adopted by the agency," or an amendment to a policy or rule, within the meaning of the APA, 5 U.S.C. § 552(a)(1), which would otherwise require publication in the *Federal Register*; or that it is a "substantive" matter within the meaning of *id.* § 553, which would otherwise require promulgation through formal public notice and comment procedures. Nor does the agency

claim that either of these requirements has been met.

We would also assert that it strains logic to hold that it is proper for an agency to formally promulgate a rule that tells the flight crew not to close the boarding door till they are certain all carryon luggage is properly stowed, but that it need not do that for a "rule" that tells them not to taxi until all passengers are seated.

Thus the single issue presented in this section is whether under the teaching of *Chenery II-Bell Aerospace* the FAA has the choice indicated.

A. Chenery II *and* Bell Aerospace *case-by-case adjudication* not applicable.

What the Fifth Circuit has done is lift out of context a seemingly broad general statement of principle, but which in fact is one that applies only in very narrow,

restrictive circumstances.[10] It misapprehends what is meant by "statutory standards," or new "principles." *Chenery II* involved a complex public-utility-securities-law issue, resolution of which depended upon an interpretation of the Securities Act. There was no broad exception to rulemaking intended there. "The function of filling in the interstices of the [Securities] Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." 332 U.S. at 202-203.

Nothing in the instant case involves the FAA's basic charter, simply the Administrator's duty to make airsafety rules. *See* FA Act, § 307, 49 U.S.C. § 1348(c). The taxi-standing rule was clearly one "to be app-

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[10] We confess to serious reservations about the use of *Chenery II* as the *touchstone* for a line of cases in which exceptions are carved out of major provisions of the Administrative Procedure Act which, enacted in 1946, 60 Stat. 237, was not a factor in that decision.

lied in the future."

Bell Aerospace provides the clearest example. The issue was whether "buyers" were employees under the labor laws who could organize a collective bargaining unit, or were they such a part of management as to be prohibited from so doing. And if the Court found that they were, whether the NLRB had to invoke its rulemaking procedures to say so. 267 U.S. at 291-292. Again, an interpretaton of basic law. *See also, Chisholm v. F.C.C.*, 538 F.2d 349, 364 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) ("[W]e are in no position to say that the Commission has misinterpreted Congress' intent or usurped its authority.").

This Court stressed in *Bell*, "Nor are fines or damages involved here." *Id.* at 296 (emphasis added). The 7-day suspension ordered was imposed as punishment for the alleged violation, as an alternative penalty to a civil money fine. Compliance and

Enforcement Program, FAA Order 2150.3, ¶ 205, at pages 13-15 (1980) (a-75). The court below overlooked this.

It also failed to deal with the fact that there was already a rule extant which governs: "During the takeoff and landing of an airplane, each person on board shall occupy an approved seat or berth with a separate safety belt properly secured about him." 14 C.F.R. § 121.311(b). The taxi-standing policy plainly amends this by expanding the portion of flight in which passengers must be in their seats. There is no brief in *Chenery II* or *Bell* to amend an existing rule through adjudication.

The Board's approval, and thus the Fifth Circuit's, of FAA's claim that "the regulations cannot contain a complete list of every prohibited act," Board Opinion and Order at 8 (a-35), overlooks reality, the agency's rules do just that: The FARs tell cockpit crews that during any "critical

phase of flight" they may not call in and order "galley supplies," confirm "passenger connections," make announcements "promoting the air carrier or pointing out sights of interest," fill out "company payroll and related records." 14 CFR § 121.542(a). The crew is further advised not to engage in any activity that would be distracting, such as, "eating meals," "nonessential conversations," "reading publications." *Id.* § 121.542(b). "For the purposes of this section, critical phases of flight includes all ground operations involving taxi, take-off and landing, and all other flight operations conduct below 10,000 feet, except cruise flight. NOTE: Taxi is defined as 'movement of an airplane under its own power on the surface of an airport.'" *Id.* § 121.542(c). *See also id.* §§ 121.543, 121.-545, 121.547, 121.548, and 121.549.[11]

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[11] Interestingly, the FAA promulgated an internal memorandum which covered the taxi-standing (continued...)

Frankly, we do not understand what relevance "foreseeability," 868 F.2d at 1453 ([redacted]), has to do with a rule-of-the-road.

Sustaining a procedural challenge to an agency policy, the District of Columbia Circuit pointed out that "The APA establishes procedural requirements for rulemaking precisely because they are presumed to elicit responses which, when given the requisite consideration by the agency, may affect its decision. Here the opportunity for such an effect has never been accorded." *Simmons v. I.C.C.*, 757 F.2d 296, 300 (D.C. Cir. 1985); *see also New England Tel. & Tel. Co. v. F.C.C.*, 826 F.2d 1101, 1110 (D.C. Cir. 1987) ("First, a departure from prior policy cannot stand when the agency fails to explain the reason for the change.")

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[11](...continued)
policy. *See* FAA Action Notice, A-8430.6, Oct. 31, 1986 (Exh.J, a-107).

A Boeing 737 captain can see most of the cabin. But not all. What do 747 captains do? Are not the airlines entitled to know the practical basis for the rule?

B. FA Act and FAA directives mandate that airsafety rules be promulgated through APA public notice and comment procedures.

Even assuming, *arguendo*, that case-by-case adjudication for making airsafety rules would otherwise apply, both Congress and the FAA itself have mandated that such rules be made only by means of APA public notice and comment procedures.

The NTSB has no air-safety rulemaking powers, adjudication or otherwise. Its only mandate vis-a-vis FAA is to act as a quasi-judicial panel and "review on appeal (A) the suspension, amendment, modification, revocation, or denial of any operating certificate or license issued by the [A-dministrator] under sections 1422, 1429, or 1431(c) of this title and the revocation of any certificate of registration under sec-

tion 1401(e)(2) of this title . . ." 49 U.S.C. § 1903(a)(9); *see also, id.* § 1429-(a).

Safety rules are solely the FAA's responsibility: "The [Administrator] is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft . . ." 49 U.S.C. § 1348(c) (FA Act § 307(c)) (emphasis added), as well as "[s]uch reasonable rules and regulations . . . as [he] may find necessary to provide adequately for . . . safety in air commerce." *Id.* § 1421(a)(6) (FA Act § 601).

Section 307 also provides: "**In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the [Administrator] shall be subject to the provisions of the Administrative Procedure Act** . . ." *Id.* § 1348(d) (emphasis added).

In keeping with this, the agency itself counsels its officials:

> A primary Congressional consideration underlying the Administrative Procedure Act is that a regulatory agency afford the public an opportunity to participate in its rule-making processes. Both the letter and the spirit of the rulemaking provisions of this act shall be observed. FAA follows the principle that the public interest is best served when regulatory affairs are open to the public to the fullest extent possible.

FAA Rulemaking Policies, FAA Order 2100.13, ¶ 22.a. at page 8 (1976).

The Court has spoken forcefully of the need for rulemaking:

> The rule-making provisions of [the APA], which the Board would avoid, were designed to assure fairness and mature consideration of rules of general applicability. . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention.

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 1969); *see also Nader v. Butterfield*, 373 F. Supp. 1175 (D.D.C. 1974) (internal FAA memo approving use of x-ray machines to inspect carryon luggage voided for lack of compliance with APA).

As it stands, the Fifth Circuit's decision approves a regulatory system where the Administrator issues formal regulations in the *Code of Federal Regulations* governing aircrew conduct, but whomever he or she may happen to be at the moment, or officials of any region, may write a letter to a single airline and create or amend them. (*See* Exhs. D, a-94; Exh. E, a-96; and Exh. G, a-102.)

Senator Pat McCarran, APA sponsor and Judiciary Committee Chairman, called it:

> a comprehensive charter of private liberty and a solemn undertaking of official fairness. . . .
>
> a bill which . . . is one of the most important measures that has been presented to the Congress of the United States in its history. . . .
>
> a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the federal government. . . .

S. Rep. No. 248, 79th Cong. 2d Sess. at III, 297 and 298 (1946).

The fact that the court below has applied the case-by-case adjudicatory principle to excuse the FAA from following APA public notice and comment procedures (5 U.S.C. § 553) in safety rulemaking in the face of a congressional mandate and the agency's own directive to do so, underscores, we respectfully submit, the need for the Court to clarify the limited scope of the *Chenery II/Bell Aerospace* exception.

The FAA's failure to either publish its taxi-standing policy in the *Federal Register*, *id.* 552(a)(1), or promulgate it as a substantive rule through APA public notice and comment procedures, *id.* § 553, requires that the case against Capt. Tearney be dismissed. *Id.* §§ 552(a)(1) and 706(2)(A) & (C).

II. "Public interest" unconstitutional basis for license penalties.

No statute or regulation so much as hints that the FAA may order suspension or

revocation of a license as a penalty for the violation of a safety rule.[12] Agency officials never deny this. What they claim is that certain language in § 609 of the FA Act, 49 U.S.C. § 1429(a), authorizes them to suspend or revoke certificates anytime they (in the name of the Administrator) deem it to be in the interests of the public and airsafety.

Section 609's pertinent language:

> The [Administrator] may, from time to time, **reinspect** any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may **reexamine** any civil airman. **If, as a result of** any such reinspection or reexamination, or **if, as a result of** any other investigation made by the [Administrator], **he determines that safety in air commerce or air transportation and the public interest requires**, [he] may issue an **order** amending, modifying, **suspending**, or **revoking**, in whole or in part, **any . . . certificate . . .** Any person whose certificate is affected by such an order . . . under this section may appeal . . . to the National Transportation Safety Board . . . [emphasis added]

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[12] Nor is there a shred of legislative history.

See also 14 C.F.R. § 13.19, and the Order of Suspension (a-1) which, after reciting details of the alleged incident and claimed violation, provides:

> By reason of the foregoing, the Administrator has determined that safety in air commerce and the public interest require the suspension of your airman certificate.
>
> Now, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by Section 609 of the Federal Aviation Act of 1958, as amended, that:
>
> (1) Any airman certificate now held by you, including Airline Transport Pilot Certificate No. 527802838, [sic--shall be suspended]

Although we submit that anyone who can parse a sentence can see that "public interest" is not a general grant of power but a condition subsequent to first reinspecting an aircraft or reexamining an airman ("if as a result of"), we assume here, *arguendo*, that this interpretation is reasonable. Thus the issue we present is whether "public interest" is sufficiently explicit language to show a constitutional

delegation of authority from Congress to the FAA to impose suspensions and revocations as penalties for the violation of safety rules. Put another way, the issue involves a common sense application of the English language.

A. Congress may not delegate its legislative power.

It is fundamental that Congress may not delegate its *Art. I, § 1* legislative power to create benefits or penalties. *United States v. Eaton*, 144 U.S. 677 (1892), *United States v. Grimaud*, 220 U.S. 506 (1910); *see also* Administrative Procedure Act, § 9, 5 U.S.C. § 558. The Fifth Circuit has recognized this basic principle:

> The federal constitution provides that "[A]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives", United States Constitution, Art. 1, § 1. Congress may not abdicate or transfer to others the essential legislative functions with which it is thus vested . . . [citing cases].

United States v. Gordon, 580 F.2d 827, 839

(5th Cir.), *cert. denied*, 439 U.S. 1051 (1978). It said further: "It is well established that a delegatee may formulate rules for violation of which the statute itself provides penalties imposable by judicial process, [citing cases, including *Grimaud*]." 580 F.2d at 840 (emphasis added). This makes the point nicely: Where is any statute which provides that suspensions and revocations may be imposed as penalties for safety violations? Nowhere.

B. APA requires specific delegation to impose a penalty.

This constitutional principle finds expression in § 9 of the APA:

> (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
>
> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

5 U.S.C. § 558(a) & (b). Its legislative history:

> This provision, limiting administratively imposed requirements to the auth-

> ority granted and delegated, **is designed to afford statutory recognition for the basic rule of law, embodied in judicial decisions.** The creation of penalties or benefits is exclusively the province of Congress.
>
> . . . .
>
> [It] means that agencies may not undertake anything which statutes or other adequate sources of authority (such as treaties) do not authorize them to do. Where these sources are specific in the authority granted **no additional authority may be assumed. . . . Sanctions in the way of penalties or relief must be identified and authorized by law, and where authorized they must in any case apply in the factual situation presented.**

S. Rep. No. 248, 79th Cong., 2d Sess. 34 and 274 (1946) (emphasis added). "No additional authority may be assumed" is another way of stating the premier maxim of statutory interpretation: Expressio unius est exclusio alterius. Congress chose civil money penalties with right to jury trial:

> (a)(1) **Any person** who violates * * * **any** rule, regulation, or order * * * **shall be** subject to a civil penalty of not to exceed $1,000 for each such violation . . .
>
> (2) Any civil penalty may be compromised by the [Administrator] . . . [emphasis added]

49 U.S.C. § 1471(a)(1) & (2). And:

> (a) The **trial** of any offense under this chapter shall be in the **district** in which such **offense** is committed [etc.] . . .
>
> (b)(1) Any civil penalty imposed or assessed under this chapter may be collected by **proceedings in personam** . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty . . . **either party may demand trial by jury** of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. . . .

49 U.S.C. §§ ~~1473(a)~~ & (b)(1) (emphasis added). Where does the FA Act say anything else? "Factual situation presented." The only factual situation that § 609 talks about is "reinspection" and "reexamination," qualifications matters. Congress wrote § 901 and § 903 with a high degree of clarity: Where in the act is there a hint that suspension or revocation may be imposed as a penalty?

To assume that Congress intended to authorize license penalties, one must also

assume that it told pilots (and other certificate holders) that they had the right to jury trial and, at worst, if found guilty, would pay only a money fine, but then turned right around and authorized an FAA official to determine in his sole discretion whether that pilot could ever exercise those rights, and substitute administrative justice with a harsh--often draconian--penalty.[13]

With all due respect to the Fifth Circuit, it seems to be saying that a "rose is a rose is a rose," that public-safety is public-safety is public-safety. 868 F.2d at 1455 ([redacted]). Nowhere does the court explain how "public interest" conveys a delegation of authority to impose a "penalty." The leading FAA case of *Pike v. CAB.*, 303 F.2d

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[13] For a complete history of FAA enforcement, *see Smith*, **FAA PUNITIVE CERTIFICATE SANCTIONS: THE EMPEROR WEARS NO CLOTHES; OR, HOW DO YOU PUNISH A PROPELLER?**, 14 Transp. L.J. 59-100 (1985) (hereinafter *"Emperor"*).

353, (8th Cir. 1962), is instructive. A commercial pilot, Pike was charged with giving flight instruction when he did not possess an instructor's certificate. The circuit court reversed revocation of his license because nothing in the statutes or FAA regulations specifically forbade him from giving instruction. Blackmun, J. (then circuit judge):

> This lack of specificity and completeness of the Regulations disturbs us for this case. Because of this we are disinclined to reach a result, drastic in its application to the individual concerned (whether it be Pike or any other), which deprives an airman of admitted experience and ability his primary means of livelihood. [Citing cases] We prefer to have, where a result of that magnitude is to be forthcoming, a statute or regulation which is more positive and definite than those here involved.

Id. at 357. To deprive an airline captain of his right to earn a living, even for seven days, is hardly insubstantial. And as seen from the emergency order (Exh. A, a-82) in *Tearney II*, the instant case was

used as an excuse to escalate the punishment to a total deprivation of his adult career. *See Pastrana v. United States*, 746 F.2d 1447 (11th Cir. 1984) (pilot's license is a property right).

See also Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (It is axiomatic that a statute is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application."); and *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws offend several important values.").

It is also puzzling as to why the court talks about "due process." 868 F.2d at 1455 ([redacted]). Nowhere in his briefs before the Fifth Circuit did petitioner raise any question about the Fifth Amendment right to due process. It is simply not relevant.

Although the lower court did not do so in connection with this issue (nor any

other that petitioner raised), 868 F.2d at 1454 ([redacted]), it cites *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294, 1296 (D.C. Cir.), *Cert. denied*, ___ U.S. ___, 108 S.Ct. 2825, 100 L.Ed.2d 926 (1988), for the proposition that there is a statutory basis for suspension sanctions. But even the NTSB in that case recognized the obvious:

> "This statute [§ 1429(a)] does not explicitly state that the Administrator may suspend a certificate for violations of the FAR; however, a prior version of this section which contained similar language has been construed to authorize the suspension of an airman license for violations of safety regulations. 4/ In *Wilson*, the court rejected the argument that the then §609 which provided for the suspension of an airman certificate "if the interest of the public so requires" did not authorize a suspension for the violation of regulations.

Komjathy, NTSB Order No. EA-2343, SE-6249, July 14, 1986. "Wilson" refers to *Wilson v. CAB*, 244 F.2d 773, *cert. denied*, 355 U.S. 870 (1957). It was followed the same year by *Hard v. CAB*, 248 F.2d 761 (7th Cir.),

cert. denied 355 U.S. 960 (1957), then by *Pangburn v. CAB*, 311 F.2d 349 (1st Cir. 1962). None of these three dealt with this *Art. 1, § 1* delegation issue, much less any APA issue. Much later came *Go Leasing, Inc. v. NTSB Bd.*, 800 F.2d 1514 (9th Cir. 1986), *and Komjathy, supra*. Like the Fifth Circuit, neither explained how "public interest" can be equated with a delegation of authority to impose a penalty. A general congressional exhortation to go forth and do good, without more, is not a proper foundation for the sound development of administrative law." *Global Van Lines v. ICC*, 714 F.2d 1290, 1295-96 (5th Cir. 1983). *See also, Jensen v. Administrator of Federal Aviation Administration*, 641 F.2d 797, 799 (9th Cir. 1981), *vacated*, 680 F.2d 593 (9th Cir. 1982) ("'[I]n the public interest' and 'would not adversely affect safety'. . . [do] not give the court a sufficient basis for review. . . .").

The FAA's claim of authority is "not in accordance with law," it is "contrary to constitutional right," and "in excess of statutory jurisdiction." For that reason this case should be dismissed. 5 U.S.C. § 706(1)(A), (B) and (C).

III. FAA failure to publish or promulgate license-penalty policy violates APA and requires dismissal.

As may be seen from the order (a-1), suspension of Capt. Tearney's Air Transport Pilot license rests on the contention that FA Act § 609, 49 U.S.C. § 1429(a), authorizes its officials to suspend or revoke anytime they deem it to be in the interests of air safety and the public.

As a reading of that section discloses, it says nothing of offenses, violations, regulations, sanctions or penalties. It speaks only of qualifications matters, reinspection of aircraft, reexamination of airmen; also true of 14 C.F.R. § 13.19, the rule which implements it. Yet FAA use of §

609 involves a dichotomy: suspension-revocation for lack of qualifications; as an alternate penalty to that of a civil-money fine.

Since the section 609 contains no language relevant to suspension, the claim that the FAA may suspend or revoke as a penalty, on its face, is "an interpretation of general applicability formulated and adopted by the agency," as well as a "statement of general policy," within the meaning of the APA, 5 U.S.C. § 552(a)(1).

The policy is referred in FAA manuals (**but not in any regulation**), for example: "[V]iolation of any rule, regulation or order issued by the Administrator is punishable either by certificate or civil penalty action." Manual of Procedures 22, Bureau of Flight Standards, Federal Aviation Agency at .0, *Enforcement Authority* (1960). At present: "Suspension may be used for punitive purposes where the nature of the vio-

lation warrants it . . ." Compliance and Enforcement Program, FAA Order 2150.3, ¶ 205.b(4) at page 15 (1980).

Statistics from 1979 reflect that 2,400 punitive certificate action cases were closed.[14] For private and student pilots, of all enforcement actions, including civil penalties, 87% were by suspension; 60% for general aviation as a whole, which includes professionals like air-taxi and commuter pilots; 20% for airline pilots. Given that the agency concedes that 99% of all violations are first offenses, and generally involve inadvertent acts, such substantial use of a penalty with often severe impact should be rather startling to those unfamiliar with FAA enforcement. *Emperor* at 60-63. Because of recent emphasis, license penalties for all pilots run as high as 95%, in 2,000 to 3,000 cases annually.

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[14] We know of none published since.

The question naturally occurs: Why would this important regulatory agency, especially when no statute hints at it, not have a rule that tells pilots that their licenses are at risk for safety violations?[15] Finding the answer to that, however, is not relevant to the issue petitioner raises.

The only issue is whether the APA, 5 U.S.C. §§ 552(a)(1), 553 and 706, requires that the license-penalty policy be either published in the Federal Register, pursuant to *id.* § 552(a)(1), or promulgated through public notice and comment procedures, pursuant to *id.* § 553.

The FAA does not deny the obvious, nor

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[15] There once was a rule: "Pilot's and mechanic's licenses will be suspended or revoked for--(A) Violating any provision of the air commerce act of 1926 or these regulations . . . (F) Violating air traffic rules." Dept. of Commerce, Air Commerce Regulations, § 74 (1926); *see also* Civil Air Regulations, 14 C.F.R. §§ 20.371 and 20.37110--(*k*) (1938). (All three in appendix.) The FAA, in at least a dozen briefs, has never acknowledged these rules, much less explain why they were appropriate from 1926 to 1940, but not since.

did the circuit court: the license-penalty policy is indisputably a "statement of general policy," and/or an "intepretation of general applicability formulated and adopted by the agency" and, because of its impact on the individual, it is unarguably "substantive." Nor has the policy been published or promulgated. Consequently, as these are given, and since Congress has mandated that the remedy for such failure is dismissal, *id.* §§ 552(a)(1) and 706, we submit there is no issue, that the FAA has defaulted.

In raising this matter, petitioner assumes, *arguendo*, that the agency has lawful authority to adopt the policy. We doubly stressed this with the Fifth Circuit. It acknowledged the APA issues: "Tearney's next claim is that the FAA's failure to publish or promulgate its certificate-sanction policy violates the APA." 868 F.2d at 1454 ([redacted]). But immediately followed with:

"He argues that the FAA is not empowered to authorize certificate actions as a sanction for a safety violation." *Id.* **Then never again mentions the APA.**

With all due respect to the lower court, the latter statement is without foundation. Nowhere in the presentation of this APA issue did we question such authority. The issues assume it, assume that the interpretation is reasonable. The only question is compliance with the APA.

What happened is this: since it cannot, and does not deny that the license-penalty policy is an interpretation of § 609 which requires publication, using it as a red-herring, rather than discuss the APA, the FAA spent many pages in their brief talking about their authority for license penalties. Obviously, it worked.

The Court has squarely held that placing a policy in an agency manual is not sufficient, that for it to be enforceable the

publication requirements of the APA must be followed. *Morton v. Ruiz*, 415 U.S. 199 (1974). "The statute [5 U.S.C. § 552(a)(1)] clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby." *Northern California Power Agency v. Morton*, 396 F.Supp. 1187, 1191 (D.D.C. 1975), *affirmed* 539 F.2d 243 (D.C. Cir. 1976). "Any agency regulation that so directly affects preexisting legal rights or obligations . . . indeed, that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect of any subject within its competence,' is within the publication requirement [of the APA]." *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977). "The purpose of requiring a statement of the basis and purpose is to enable courts, which have the

duty to exercise review, to be aware of the legal and factual framework underlying the agency's action." *Am. Standard, Inc. v. U.S.*, 602 F.2d 256, 269 (U.S.Ct. of Claims 1979). "Any claim of exemption from APA rulemaking requirements 'will be narrowly construed and only reluctantly countenanced.' [Citing cases]" *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983).

As the Fifth Circuit's decision stands, it approves of a remarkable situation: Without any statute to support it, the Federal Aviation Administration employs in the vast majority of its safety enforcement cases a harsh penalty that is normally reserved for the most serious offenses, claims that it has authority to deny a pilot his statutory right to jury trial, yet neither publishes nor promulgates its claims in the *Federal Register* or *Code of Federal Regulations* where they may be read

by layman and lawyer alike, or challenged.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

Lawrence B. Smith
Counsel for Petitioner

3938 E. Grant Rd., #191
Tucson AZ 85712
602/326-0283

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